# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1939

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## No. 514

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BYRON THORNHILL,

*Petitioner,*

*vs.*

THE STATE OF ALABAMA

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

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## BRIEF FOR THE PETITIONER

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ON THE WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALABAMA

## BRIEF OF THE PETITIONER

### I

### Nature of Appeal and History of Procedure

This is an appeal from the judgment of the Court of Appeals of Alabama, Sixth Division, rendered on January 17, 1939, which affirmed a judgment of the Circuit Court of Tuscaloosa County, State of Alabama, rendered on the 20th day of December, 1937, wherein Byron Thornhill was found guilty of violating Section 3448, Code of Alabama, 1923, entitled "Loitering or Picketing Forbidden." Ap-

plication for rehearing having been filed and denied, a writ of certiorari was petitioned for in the Supreme Court of Alabama (T. R. page 20). On June 15, 1939, the Supreme Court of Alabama denied the petition for certiorari. Certificate of judgment, based on such denial, was recorded on the 15th day of June, 1939 (T. R. page 22). The Court of Appeals of Alabama filed a written opinion (T. R. page 16). Said opinion is reported at 189 So. 914 (July 20, 1939), and is also set forth in Appendix "A", printed together with the petition for writ of certiorari on file herein.

## II

## Jurisdiction

The statutory provision is Judicial Code, Section 237-B, as amended by the Acts of February 13, 1925, 28 U. S. C. A., Section 344, page 205.

## III

## Provisions of the Constitution in Question and Statutes Involved

The Federal right claimed by the petitioner is that the Statute under which he was convicted is upon its face, as applied to him, unconstitutional in denying to him due-process of law under the *XIVth Amendment to the Constitution of the United States.* This claim is grounded upon the contention that Alabama's anti-picketing law, which prohibits picketing, even though peaceful, deprives the petitioner of freedom of speech and assemblage; and that the Court of Appeals of Alabama denied him the protection of the "due-process" clause of the XIVth Amendment, by extending the purview of the statute to the petitioner's actions on the occasion in question. The statute in question is as follows:

Section 3448, Code of Alabama, 1923:

> "Loitering or Picketing Forbidden.—Any person or persons, who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporation, or association, or who picket the works or place of business of such other persons, firms, corporations, or associations of persons, for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

## IV

## Statement of the Case

Petitioner was charged with "picketing and loitering" in connection with a labor dispute in violation of the above statute. Petitioner's action on the occasion in question consisted of asking another employee without threats, or show of force, direct or implied, not to resume his employment in an industrial plant until a strike, then in progress, was settled (R. 9-13). The Court of Appeals held that the constitutionality of the statute was established by two previous decisions of the Supreme Court of Alabama, *Hardie-Tynes* v. *Cruise*, 189 Ala. 66, 66, So. 657, and *O'Rourke* v. *City of Birmingham*, 169 So. 206, 27 Ala. App. 133. (See Appendix "B" and "C" of the petition for writ where these decisions are set forth.) The Court interpreted the statute in the case at bar as preventing any picketing whatsoever, regardless of whether or not it was peaceful, and further construed the statute as preventing one worker asking another worker not to accept employment in an employer's plant.

The foregoing is the statement of the case as set forth in the petition for writ of certiorari (page 11). However, in view of the statement of certain facts and the omission of their qualifying and explanatory facts, set out in the brief of the Attorney General of Alabama, the petitioner considers it necessary to call to the Court's attention certain additional portions of the record.

In the Attorney General's brief the statement is made that the picket line was on company property, the inference being that the petitioner was a trespasser. The record shows, however (R. 12), that Brownville is a company town:

> "The union meets on property of Brown Wood Preserving Company; the company has not made demand on the men since the strike was called, not to come on company property. The employees get their mail from a United States' Post Office located on company property—practically all the men who work in the plant of the Brown Wood Preserving Company live on company property—the picket post which I have referred to were tents in which the men stayed to keep warm in cold weather."

The State hints at intimidations and coercions by pointing out that 6 or 8 men were in and around these tents or picket posts, but as shown by the Record (R. 10) the prosecuting witness for the State testified:

> "none of the other men said anything to me",

and further

> "neither Mr. Thornhill nor any other employee threatened me on the occasion testified to."

The prosecuting witness goes further and, without objection on the part of the State, testified to the state of his own mind:

"Mr. Thornhill approached me in a peaceful manner *and did not put me in fear;* he did not appear to be mad."

The only other witness for the state testified as follows:

"At the time Mr. Thornhill and Clarence Simpson were talking to each other there was no one else present, and I heard no harsh words and saw nothing threatening in the manner of either man."

## V

## Errors Assigned

1. That the courts of Alabama erred in holding that *Section 3448 of the Code of Alabama, 1923, supra,* was not violative of the *XIVth Amendment to the Constitution of the United States.*

2. That the courts of Alabama deprived the petitioner of the protection of the due-process of law clause of the XIVth Amendment, by extending the purview of Section 3448, *supra,* to the petitioner's actions on the occasion in question. (Both errors assigned will be discussed together.)

## ARGUMENT

### Point 1

### That the Alabama Anti-Picketing Statute, Section 3448 of the Code of Alabama, 1923, Supra, Violates the VIXth Amendment to the Constitution of the United States

It is clear from the facts in this case that we are dealing with a conviction for peaceful picketing and that the Alabama Court construed the statute to prohibit peaceful picketing. That statute must be tested in the light of its construction by the courts of Alabama. *Truax* v. *Corrigan,* 257 U. S. 312. There is no room for question that the Court construed the statute as prohibiting peaceful picketing. It based its

decision in this case on *O'Rourke* v. *City of Birmingham*, 168 So. 206; and *Hardie-Tynes Mfg. Co.* v. *Cruise, et al.*, 66 So. 657.

In the *O'Rourke* case the Court said:

> "Defendant spoke to no person, simply walking slowly and peacefully back and forth along the sidewalk immediately in front of said theatre with said sign or placard being exhibited so as to be visible to persons walking along the street near said theatre and was so conducting himself when he was arrested.
>
> • • • • • • •
>
> "The purpose of the defendant's conduct, as above described, was to advise customers of said theatre and prospective customers of said theatre, of the relationship existing between the Ritz Theatre and its employees, and to influence such customers and prospective customers not to patronize said theatre on account of said theatre's failure and refusal to employ persons who were members of Labor unions affiliated with the American Federation of Labor."

In the *Hardie-Tynes Mfg. Co.* case, the Court said:

> "The meaning and purpose of these provisions are, we think, too plain for serious discussion. Sections 6394 and 6856 are broad enough to include even the peaceful persuasion of would-be employees not to serve an employer, if its intention and effect is to prevent the operation of a lawful business. • • • Perhaps our Legislature has taken the view, adopted by some of the courts, that in actual practice there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effect of our statutes."

As so construed, is the statute constitutional?

In *Peoples* v. *Harris*, 91 Pac. (2d) 993, the Supreme Court of Colorado recently held that Colorado's Anti-Picketing Statutes was unconstitutional in that it violated the "due-

process" clause of the *XIVth Amendment to the Constitution of the United States.* For the purpose of comparison and to show the identical nature of these two statutes, the Colorado statute declared unconstitutional and the Alabama statute here challenged are set out in parallel columns.

| SECTION 90, CHAPTER 97, 1935, COLORADO STATUTE ANNOTATED | SECTION 3448, CODE OF ALABAMA, 1923, "LOITERING OR PICKETING FORBIDDEN" |
|---|---|
| "It shall be unlawful for any person or persons to loiter about or patrol the streets, alleys, roads, highways, trails or place of business of any person, firm or corporation engaged in any lawful business, for the purpose of influencing, or inducing others not to trade with, buy from, sell to, work for, or have business dealings with such person, firm or corporation, or to picket the works, mine, building or other place of business or occupation of such other person, persons, firm or corporation, for the purpose of obstructing or interferring with or injuring any lawful business, work, or enterprise; provided, that nothing herein shall prevent any person from soliciting trade, custom or business for a competitive business." | "Any person or persons, who without a just cause or a legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing or inducing other persons not to trade with, buy from, sell to, having business dealings with, or be employed by such other persons, firm, corporation, or association, or who pickets the works or place of business of such other person, firm, corporation, or associations of persons, for the purpose of hindering, delaying or interferring with, or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; nothing herein shall prevent any person from soliciting trade or business from a competitive business." |

In its discussion of the above statute the Colorado Court said at page 990:

> "Section 90, *supra*, was enacted by the legislature in 1905. *Only one other state, Alabama, has a similar law.* No litigation involving its construction has ever reached this Court.
>
> "Every student of the law will readily admit that changes have occurred since the enactment of Section 90, *supra*, relating to labor disputes. Much statute law has since been enacted in the interest of labor and in its lawful rights to secure reasonable wage levels. It is quite universally conceded now that labor has a right to organize and to lawfully protect its economic interest. * * * It is generally admitted that the right of collective bargaining is here to stay. The need in our economic life of organized labor as an important factor in maintaining wage levels is generally accepted."

The Colorado Court further said — this case, at page 991:

> "By a great weight of authority, peaceful picketing, so long as it does not in fact involve force, intimidation, breach of the peace, or coercion, has been sustained in many cases."
>
> *Pope Motor Car Company* v. *Keevan C. C.*, 150 Fed. 148.
>
> *Niles* v. *Bement-Pond Company* v. *The Iron Moulders' Union, D. C.*, 246 Fed. 851.
>
> *Great Northern Railway Company* v. *Brosseau*, 286 Fed. 414.
>
> *American Steel Foundries* v. *The Tri-City Central Trades Council*, 257 U. S. 184, 42 S. Ct. 72.
>
> *Senn* v. *Tile Layers' Union*, 301 U. S. 468, 57 S. Ct. 857.

See also the recent case of *The City of Yakima* v. *Gorham*, decided September 27, 1939, 94 Pac. (2d) 180.

In the majority of jurisdictions in this country peaceful picketing is legal. It is true that some jurisdictions have legislation which expressly legalizes peaceful picketing.

However, in those jurisdictions in discussing the legislation the Court refer to the fact that prior to the adoption of the legislation peaceful picketing was legal in said states.

*Exchange Bakery & Restaurant* v. *Rifkin*, 245 N. Y. 260, 157 N. E. 130;

*Bayonne Textile Corp.* v. *American Federation of Silk Workers*, 116 N. J. Eq. 146, 172 A. 551;

*Steffes* v. *Motion Picture Mach. Operators Union*, 136 Minn. 200, 161 N. W. 524;

*Kirmse* v. *Adler*, 311 Pa. 78, 166 A. 566;

*United Chain Theatres* v. *Philadelphia Moving Picture M. O. Union* (*D. C.*), 50 F. (2d) 189;

*S. A. Clark Lunch Co.* v. *Cleveland Waiters & Beverage Dispensers*, 22 Ohio App. 265, 154 N. E. 362;

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*Cinderella Theatre Co.* v. *Sign Writers' Local Union*, (*D. C.*), 6 F. Supp. 164;

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*Dean* v. *Mayo* (*D. C.*), 8 F. Supp. 73;

*Miller Parlor Furniture Co.* v. *Furniture Workers' Industrial Union*, (*D. C.*), 8 F. Supp. 209;

*National Protective Asso.* v. *Cumming*, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648;

*Mann* v. *Raimist*, 255 N. Y. 307, 174 N. E. 690, 73 A. L. R. 669;

*Wise Shoe Co.* v. *Lowenthal*, 266 N. Y. 264, 194 N. E. 749;

*Curran* v. *Galen*, 152 N. Y. 53, 46 N. E. 297, 37 L. R. A. 802, 57 Am. St. Rep. 496;

*Jacobs* v. *Cohen*, 183 N. Y. 207, 76 N. E. 5, 2 L. R. A. (N. S.) 292, 111 Am. St. Rep. 730, 5 Ann. Cas. 280;

*Kissam* v. *United States Printing Co.*, 199 N. Y. 76, 92 N. E. 214;

*Roddy* v. *United Mine Workers*, 41 Okla. 621, 139 P. 126, L. R. A. 1915D, 789;

*Shaughnessy* v. *Jordan*, 184 Ind. 499, 111 N. E. 622;

*Grace Co.* v. *Williams*, (*D. C.*), 20 F. Supp. 263;

*L. L. Coryell & Son* v. *Petroleum Workers Union*, (*D. C.*), 19 F. Supp. 749;

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*Geo. R. Wallace Co.* v. *International Asso. M. M. H. L.*, 155 Or. 652, 63 P. (2d) 1090;

*Starr* v. *Laundry & D. C. W. L. Union*, 155 Or. 634, 63 P. (2d) 1104;

*Levering & G. Co.* v. *Morrin* (C. C. A. 2d) 71 F. (2d) 284, writ of certiorari denied in 293 U. S. 595, 76 L. Ed. 688, 55 S. Ct. 110;

*La France Elec. Supply Co.* v. *International Brotherhood of Elec. Workers*, 108 Ohio St. 61, 140 N. E. 899;

*McCormick* v. *Fisher & Local Union #216 Hotel and Rest. Employees*, 13 Ohio Cir. Ct. R. (N.S.) 545;

*Riggs* v. *Cincinnati Waiters Alliance Local*, 5 Ohio N. P. 386, 8 Ohio S. & C. P. Dec. 565;

*Jones* v. *Van Winkle Gin & Mach. Works*, 131 Ga. 336, 340, 17 L. R. A. (N.S.) 848, 127 Am. St. Rep. 235, 62 S. E. 236;

*Karges Furniture Co.* v. *Amalgamated Woodworkers Local Union*, 165 Ind. 421, 430, 431, 2 L. R. A. (N.S.) 788, 75 N. E. 877, 6 Ann. Cas. 829;

*Everett Waddey Co.* v. *Richmond Typographical Union*, 105 Va. 188, 197, 5 L. R. A. (N.S.) 792, 53 S. E. 273, 8 Ann. Cas. 798;

*Stoner* v. *Robert*, 53 Wash. L. Rep. 437;

*Empire Theatre Co.* v. *Cloke*, 53 Mont. 183, L. R. A. 1917E, 383, 163 Pac. 107;

*Mills* v. *United States Printing Co.*, 99 App. Div. 605, 91 N. Y. Supp. 185, affirmed in 199 N. Y. 76, 92 N. E. 214;

*Ex Parte Sweitzer*, 13 Okla. Crim. Rep. 154, 162 Pac. 1134;

*White Mountain Freezer Co.* v. *Murphy*, 78 N. H. 398, 101 Atl. 357;

*American Engineering Co.* v. *International Moulders' Union*, 25 Pa. Dist. R. 564;

*Iron Moulders' Union* v. *Allis-Chalmers Co.*, 20 L. R. A. (N.S.) 315, 91 C. C. A. 631, 166 Fed. 45;

*St. Louis* v. *Gloner*, 210 Mo. 502, 15 L. R. A. (N.S.) 973, 124 Am. St. Rep. 750, 109 S. W. 30.

The above are among a legion of cases holding that, in the absence of legislation on the subject, peaceful picketing is lawful. At page 992 of *People* v. *Harris, supra*, the Colorado Court further said in discussing picketing:

> "It is an appeal to the public and to the members of the union not to patronize an employer who does not conform to the standards of organized labor relative to wages, hours, and conditions of employment. The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is *damnum absque injuria* * * * such loss, under our social and economic system, is merely the result of a conflict of interest between capital and labor."

Further at page 993

> "It is argued that peaceful picketing is a crime under section 90, *supra*. If the legislative intent requires such a construction, then the law must, within the limits of the stipulated facts, be held to be unconstitutional as being a denial of freedom of speech. Those who seek reversal necessarily must contend that said section prohibits peaceful picketing of any kind, at any time, at any place near the employer's premises, and in any manner.' If this contention is upheld, we have what amounts to an exercise of arbitrary power *in violation of the due-process of law provision contained in*

*Amendment XIV.*" • • • "we are not here concerned with a statute which only regulates peaceful picketing, but one which forbids it. This unqualified prohibition would, in our opinion, violate 'those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'."

The Colorado Court further said in the same case at page 993,

> "The case of *Hardie-Tynes Manufacturing Company* v. *Cruise*, 189 Ala. 66, 66 So. 657, 661 (*one of the cases on the authority of which the conviction of the petitioner in the instant case was affirmed*) is cited as authority to the point that Section 90 *supra*, forbids peaceful picketing. That, undoubtedly, is the effect of the case. The question of the constitutionality of the Alabama Act was there raised and the Court said 'no intimation is offered as to what provision of the Constitution is hereby offended and we can think of none'. We may assume that since no criminal offense was involved in the *Hardie-Tynes* Case that the Constitutional questions presented in the instant case was not seriously considered in that litigation."

But, on rehearing in the *O'Rourke* Case, the other case on the authority of which the petitioner's conviction was sustained, the Alabama Court directly held that the Alabama statute did not deprive the defendant of the protection of the due-process of law clause of the XIVth Amendment. (Appendix "B" Brief in support of Petition for Certiorari.)

And further at page 994,

> "It cannot be successfully maintained that guarantees of freedom of speech are less important than guarantees relating to property • • • whatever our individual views may be on economic controversies such as involved here, we cannot consent to legislative invasion of constitutional guarantees to the extent for which contention is made in this case. The line of

demarcation between police power and constitutional guarantees is not always well defined. Where a law, such as Section 90, here under consideration, impairs freedom of speech as it does, in view of the stipulated facts before us, we have no doubt that it constitutes an invasion of constitutional guarantees, both under the State and Federal due-process of law clauses and the mandatory provision prohibiting the enactment of laws impairing the freedom of speech".

The conflict between human rights and property rights was discussed in *Ex Parte Lyons,* 81 Pac. (2nd) 192:

> "Petitioner bases his right, to peacefully picket, on the provisions of the first and fourteenth amendments to the Federal Constitution, U. S. C. A. Const. Amends. 1, 14, and on section 9 of article 1, of the state Constitution which guarantee the unrestricted right of free speech. Thus we have here a recurrence, in a somewhat novel form, of that struggle between property rights and personal rights which has occupied the attention of the courts of the land since the organization of the Republic. The courts have always been zealous to protect the rights of persons to acquire, own and enjoy property. They have been more zealous, if possible, to protect the personal right of free speech and perhaps justly so, for free discussion contains the germ of progress which keeps flowing the blood stream of the Republic."

Since the filing of this petition, this Court, through Mr. Justice Roberts, delivered an opinion, on November 22nd, 1939:

> In Re: *Clara Schneider* v. *The Town of Irvington;*
> *Tim Young* v. *California;*
> *Snyder* v. *Milwaukee;*
> *Nichols et al.* v. *Massachusetts.*

These cases appeared as numbers 11, 13, 18, and 29, of the present term docket, and were considered together. These

cases are too fresh in the minds of the court to require extended citation.

These were all cases involving freedom of the press; yet the Court said in its opinion:

> "The freedom of *speech* and of press secured by the First Amendment against abridgement by the United States is similarly secured to all persons by the XIVth Amendment against abridgement by a State".

This statement of Mr. Justice Roberts emphasizes the equal sacredness of freedom of speech and of freedom of press. In *Snyder* v. *Milwaukee, supra,* No. 18, the Court states the facts to be this,

> "The petitioner, who was acting as a picket, stood in the street, in front of a meat market, and distributed to passing pedestrians hand-bills which pertained to a labor dispute with the meat market, and asking citizens to refrain from patronizing it".

In the case at bar, the petitioner merely stood at the entrance of an industrial plant, and orally requested a fellow employee to refrain from accepting reemployment during a strike. If the Court held in the *Snyder* Case, *supra,* that it was not within the police power of the State to limit freedom of *press,* even in an industrial dispute, it must necessarily follow that it is not within the police power of the state to limit freedom of *speech* in an industrial dispute, and therefore the conviction of the petitioner was wrongful. It is further significant that each of the above statutes and ordinances were declared unconstitutional. A clever attempt was made by the legislative authority to conceal the real purpose for which the legislation was enacted, and to insert into each of these pieces of legislation some clause, or catch phrase, on which they might be held constitutional. This Court, in each case, removed the tinsel and condemned the bad apple hidden underneath.

This Court further said in these cases:

"In every case, therefore, where legislative abridgement of the right is asserted, the Court must be astute to examine the effects of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

"This Court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this Court, the importance of preventing the restriction of enjoyment of these liberties."

This Court recently said in the case of *C. I. O. v. Hague*, 59 S. Ct. 958.

"It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due-process clause of the Fourteenth Amendment".

Mr. Justice Butler, in his dissenting opinion in the case of *Senn v. Tile Layers Union*, 57 S. Ct. at page 867, 81 L. Ed. 1229, said:

"The right of workers, parties to a labor dispute, to strike and picket peacefully to better their condition does not infringe any right of the employer".

Yet the Alabama Court, in the *Hardie-Tynes* case, 66 So. at 657, *supra*, as previously pointed out, said:

"Perhaps our Legislature has taken the view, adopted by some of the Courts, that in actual practice

> there is and can be no such thing as peaceful picketing or peaceful persuasion. Certainly this is the effect of our statute",

If that is the "effect of the statute" then it must fall. By the express statement of the prosecuting witness in the case at bar, the petitioner's actions were entirely peaceful. There was probably never a "peaceful election", yet it would be absurd to argue that simply because elections are not peaceful that the right of citizens to discuss them is not protected by the guarantee of freedom of speech; and that the State under the guise of its police power can restrict a citizen's right to discuss or hold elections.

In the case of *Herndon* v. *Lowry*, 301 U. S. 242, this Court said,

> "The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the State. Legislation which goes beyond this need violates the principle of the Constitution".

And applicable to this situation is also the statement of Mr. Justice Holmes in *Schenck* v. *United States*, 249 U. S. 47, at page 52:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree."

There is certainly no question involved in this case of the safety of the State. But the right here sought to be

protected by the Legislature is the employer's right to maintain the *status quo* without interference by his employees. For the Alabama courts to hold that one American workman cannot freely speak his sentiments to another American workman, concerning their mutual working conditions, is to indoctrinate our law with a philosophy foreign to English speaking people, and strike down the fundamental guarantees they have won in their Bill of Rights.

The court of Alabama, in the case of *Hardie-Tynes* v. *Cruise, supra,* further said in discussing picketing:

> "The 'liberty' guaranteed by the Constitution (article 1, paragraph 1) is liberty regulated by law and the social compact; and in order that all men may enjoy liberty it is the tritest truism to say that every man must renounce unbridled license".

To hold that peaceful discussion of working conditions is, "unbridled license", is to stretch the imagination beyond the breaking point. The rights of peaceful assembly and freedom of speech, are sacred rights wrung from despotic sovereigns, intent, on exercising "unbridled license" in the government of their subjects.

The Alabama court further said in the *Hardie-Tynes* case, *supra,*

> "If one man asserts the constitutional right of preventing another from the pursuit of a lawful business, what is to become of the undoubted constitutional right of the other to pursue his business unmolested?"

The petitioner confesses that he knows of no constitutional right that the employer has to "pursue his business unmolested", especially a right to pursue that business unmolested by reasonable, and peaceful argument, on the part of his employees, for humane treatment and a decent standard of living. As to this argument Colorado said in the case of *People* v. *Harris, supra,*

> "The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is damnum absque injuria".

Recently, the case of *City of Reno* v. *The Second Judicial District Court of the State of Nevada* was decided by the Supreme Court of the State of Nevada. (Not yet printed in the advance sheets.) Our labors have been very much lightened by the completeness of this decision and its exhaustive citations of all relevant authority. We have, therefore, printed it in full at the end of this brief, and we respectfully refer the Court to the same.

POINT II

**The Petitioner's Conviction Was Without Due-Process of Law in Violation of His Right of Freedom of Speech**

The Court of Appeals of Alabama in its opinion in this case (R. 20) said:

> "The evidence adduced upon the trial was sufficient to bring the appellants actions, for which he was being prosecuted, within the purview of the prohibition implied in the statute."

Are citizens to be convicted for the violation of prohibitions that are merely "implied in the statute"? If so, clearly, the courts are exercising arbitrary authority in violation of the due-process of law clause of the *XIVth. Amendment.*

The criminal misconduct for which the petitioner was convicted consisted of requesting his fellow worker not to return to work until a strike was settled. Certainly there is nothing in the petitioner's action here to justify a reasonable apprehension of danger to the organized government of the State so as to admit an abridgment of freedom of speech. In *De Jonge* v. *Oregon*, 299 U. S. 363, the Chief

Justice in speaking of the Legislature's right to abridge freedom of speech and assembly said:

> "These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.
>
> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government."

It is well settled that it is not only the interpretation of a statute which controls, but also the manner in which the statute is applied to the facts in the particular case. See *Herndon* v. *Lowry, supra.* An examination of the facts in this case and the case of *O'Rourke* v. *City of Birmingham, supra,* will show that this statute is being ruthlessly applied in Alabama to protect the economic interest of the employer against the human rights of the worker. It is regrettable that the published opinions do not contain more instances of the manner in which the statute is applied. In the vast majority of these "applications" the prisoner is unable to appeal.

Freedom of speech is a part of the political inheritance which Americans derived from the mother country; it is our birthright and it is the duty of the State to which we have delegated the right to govern us, to protect and enforce it; but only through stubborn resistance to the exer-

cise of arbitrary power will it be preserved to us. The fact that picketing is distasteful to a group of legislators should not be warrant to them, under pretext of exercising the police power to preserve order, to abridge freedom of speech.

A mere threat of disorder cannot be seized upon as valid excuse for abridging the fundamental guarantees of the Bill of Rights. As Mr. Justice Brandeis said of the generation that included those who inserted these guarantees into the Constitution:

> "Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. Whitney *v.* California, 274 U. S. 357, at 377."

**The State's Defense**

The State's defense of its statute here challenged, as appears from its brief filed in opposition to the petition for certiorari, seems to be entirely one of technical evasion. If the Attorney General of Alabama had desired not to meet the merits of this case, he might well have done as the Attorney General of Colorado did in the case of *Peoples* v. *Harris, supra.* It will be noted in the opinion in this case on page 990, paragraph 5:

> "The position of the people is supported here by Amicus Curiae, while the Attorney General joins with counsel for defendant urging the invalidity of the statute".

Without attempting to defend the merits of the statute, the Attorney General put forward in his brief the two following arguments:

A. That the Federal question was not properly raised.

B. That the case presented to the Court was not one of peaceful picketing.

These two points will be dealt with briefly.

A. An examination of the Record (R. 4) will show that, to the affidavit and warrant filed in the Inferior Court of Tuscaloosa County, the petitioner filed the following demurrers:

> "5. That the statute which the defendant is charged with violating in said complaint is repugnant to the XIVth Amendment of the Constitution of the United States."
>
> "6. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it refuses him the right of peaceful assemblage as guaranteed by Constitution of the United States."
>
> "7. That the statute which the defendant is charged with violating in said complaint is repugnant to the Constitution of the United States in that it contravenes the defendant's right of freedom of speech."

And in the Circuit Court of Tuscaloosa County, Alabama, the above three demurrers, 5, 6, and 7, were refiled to the complaint of the State (R. 7). Further, in the Circuit Court, the constitutionality of the statute was again raised on motion to exclude the State's evidence (R. 13).

The Court of Appeals of Alabama, in its opinion affirming the conviction of the petitioner in the Circuit Court, said:

> "so, as conceded by able counsel here representing appellant, 'the one question involved in this appeal is the constitutionality vel non of Section 3448 of the Code of Alabama, 1923'".

The Court of Appeals then further said, that it must affirm the conviction on the authority of *O'Rourke* v. *The City of Birmingham*, 27 Ala. Ap. 133, 168 So. 206, certiorari denied 232 Ala. 355, 168 So. 209; and *Hardie-Tynes Manufacturing Company* v. *Cruise et al.*, 189 Ala. 66, 66 So. 657. It will

further be noted in the *O'Rourke* Case on rehearing the Court said:

> "This Court having no inclination to deprive the appellant of any legal right or retard in any manner his full right of review of every pertinent question involved, therefore grants the request aforesaid and holds directly which is already in said opinion been impliedly held, from the authorities cited, by which we are governed and controlled, that in over-ruling the demurrers to the complaint in this cause, the application of the provisions of *Chapter 91 of the Code of Alabama, 1923*, the trial Court acted without error, *168 So. 206, 27 Ala. App. 133.* We are of the opinion that the ruling complained of had no tendency to deprive the appellant of his rights, powers, privileges and immunities as secured and guaranteed to him by the provisions of the *XIVth Amendment to the Constitution of the United States.*"

It is difficult to conceive of a more definite adjudication of the Federal question involved in the case at bar than the foregoing statement in its parent *O'Rourke* Case. The only merit in the State's argument in this particular seems to be the conjecture that the Court of Appeals might have overlooked the opinion on rehearing in the *O'Rourke* Case in deciding the case at bar.

The State further takes the highly technical position that, as certiorari was denied in the *O'Rourke* Case as well as in the case at bar, it was not a decision of "*the highest Court of the State*". However, the jurisdictional statute, here relied on, does not require a decision by "*the highest Court of the State*" but merely by the *highest Court of a State in which a decision could be had.* The Court of Appeals of Alabama is the *highest Court of the State of Alabama in which a decision could be had* as a matter of right. The granting of Certiorari by the Supreme Court of Alabama is a matter of grace.

While it would not be necessary to give this Court jurisdiction of this proceeding, the petitioner prayed a Writ of Certiorari of the Supreme Court of Alabama, in which petition he assigned as error:

> "5. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of the XIVth Amendment of the Constitution of the United States."
>
> "8. That the Court of Appeals erred in holding that Section 3448 of the Code of Alabama, 1923, was not violative of the Constitution of the United States."

It should further be noted that, under the jurisdictional statute here relied on, it is not necessary that the *"highest Court of a State in which a decision could be had"* 'decide', on the face of its opinion, the Federal question, but merely that the Federal issue be *drawn in question.*

B. The next technical safeguard by which the State attempts to protect its statute is the argument that the facts at bar do not constitute a case of peaceful picketing, and that there was implied intimidation in this case. The record completely negatives such contention. Quoting from the record (R. 10):

> "neither Mr. Thornhill nor any other employee threatened me on the occasion testified to. Mr. Thornhill approached me in a peaceable manner, and did not put me in fear; he did not appear to be mad."

The State's witness, J. M. Waldon, further testified (R. 12):

> "at the time Mr. Thornhill and Clarence Simpson were talking to each other there was no one else present, and I heard no harsh words, saw nothing threatening in the manner of either man."

The implication of the Attorney General's argument is that Mr. Simpson should have been afraid of Mr. Thornhill, be-

cause Mr. Thornhill was a union man and Mr. Simpson was not. Simpson and Waldon were the only two witnesses called by the State. The proposition of law, that a party calling a witness is bound by the testimony of that witness, is too well established to require citation of authority. We are confronted with the situation of the two State witnesses testifying that Mr. Thornhill's actions on the occasion in question were entirely peaceful; the argument of the Attorney General, that it could not possibly have been peaceful since Mr. Thornhill was a "picket", and that the word "picket" is borrowed from the nomenclature of warfare. (Brief in opposition to petition, page 18.)

As was said in the case of *George B. Wallace Company* v. *International Association*, 155 Or. 652, 63 Pac. (2d) 1080:

> "It is urged here, and some courts have held (as did the Alabama Court in the *Hardie-Tynes* Case, *supra*) that there can be no such thing as peaceful picketing but picketing is per se a species of coercion and intimidation. That doctrine has long since been discarded."

We need go no further than to cite *Senn* v. *Tile Layers' Union*, 301 U. S. 468, wherein Justice Brandeis, speaking for the Court, said:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.
>
> . . . . . .
>
> "It is true that disclosure of the facts of the labor dispute may be annoying to Senn even if the method and means employed in giving the publicity are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, is not an invasion of the liberty guaranteed by the Constitution. Compare Pennsylvania Railroad Co. *v.* United Railroad Labor Board, 261 U. S. 72. It is true,

also, that disclosure of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right."

**Statute Violates Established Rules Requiring Certainty of Specification of Charge**

In addition to the inherent viciousness of the statute and its tendency to strip the petitioner of his constitutional guarantees, we think the statute violates all the established rules of certainty of specification of charge and standard of guilt. In affirming the petitioner's conviction by the trial court (R. 20), the Court of Appeals of Alabama said that the petitioner's actions were "within the purview of the prohibition implied in the statute". One of the fundamental principles of English-speaking justice is that a person charged with crime shall be informed of the charge against which he is called upon to defend, and the crime must be defined with certainty in order that citizens may gauge the effect of their conduct in advance of their actions. Only those acts which are stated with certainty by the legislative authority to be criminally reprehensible can carry criminal responsibility. There is no implied crime; criminal statutes must definitely define acts which amount to criminal conduct.

On this aspect of the statute the Colorado Court said, in speaking of their own Anti-Picketing Law, in *Peoples* v. *Harris, supra*:

"The constitutionality of section 90, *supra*, also is challenged on the ground of uncertainty, in that there is a failure to sufficiently define standards of guilt to meet constitutional requirements. See *United States* v. *Reese*, 92 U. S. 214, 219, 220, 23 L. Ed. 563; *United States* v. *Brewer*, 139 U. S. 278, 288, 11 S. Ct. 538, 35 L. Ed. 190; *Todd* v. *United States*, 158 U. S. 278,

282, 15 S. Ct. 889, 39 L. Ed. 982; *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81, 89, 41 S. Ct. 298, 65 L. Ed. 516, 14 A. L. R. 1045; *Herndon* v. *Lowry*, 301 U. S. 242, 263, 57 S. Ct. 732, 81 L. Ed. 1066; *Lanzetta* v. *State*, 59 S. Ct. 618, 82 L. Ed. —; *People* v. *Mooney*, 87 Colo. 567, 290 P. 271. There is merit in this contention, but, in view of the conclusions reached, we deem it unnecessary to decide that and other questions raised."

**Conclusion**

The Supreme Court of Alabama said in *Hardie-Tynes* v. *Cruise*, *supra*, one of the cases on authority of which the Court of Appeals of Alabama upheld the petitioner's conviction;

> "Perhaps our Legislature has taken the view adopted by some of the courts that in actual practice there can be no such thing as peaceful picketing, or peaceful persuasion. Certainly this is the effect of our statute."

From the above statement and the Court's action in the present case, there can be no doubt that the Alabama Courts have adopted the credo of the intrenched reactionary forces who have continually maintained and constantly urged the superiority of property rights over human rights. The dislike of any movement which tends to disturb the status quo is probably best expressed by the hysterical statement in *Moore* v. *Union*, 402, 179 Pa. 417; and *Atcheson, T. S. F. Ry. Co.* v. *Gee et al.*, 139 Fed. 582 (1905).

> "There can be no such thing as peaceful picketing, any more than there can be chaste vulgarity or peaceful mobbing, or lawful lynching."

Those who would strip the people of their constitutional liberties, in order to protect their vested property interests, might well harken to the warning set out in *Ex Parte Lyons*, 81 Pac. (2nd) at 197:

> "In a Republic it is necessary that the right of freedom of speech and freedom of press be zealously guarded by the Court. These rights form the life stream of liberty. History teaches us that when these rights are suspended the right to possess and enjoy private property rapidly vanishes."

We have undertaken to show that the Alabama Legislature, in forbidding peaceful picketing, has violated one of the most necessary and sacred of American rights—the right of freedom of speech.

The construction placed upon the statute by the Alabama courts is such as to deny workers the right to peaceably assemble and peaceably discuss their working conditions with their fellow workers in the vicinity of their employer's plant.

The petitioner submits that the relief prayed should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

JAMES MAYFIELD,
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*Washington, D. C.*

## APPENDIX

## IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 3245

CITY OF RENO, a Municipal Corporation, *Petitioner*,

*vs.*

THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE, WILLIAM McKNIGHT, Judge of Said Court, and CHARLES REEL and ALVIN RAE, *Respondents*

Douglas A. Busey, Attorney for Petitioner, City of Reno.
Lloyd V. Smith, Attorney for Respondents.

### Opinion

By the Court, DUCKER, J.:

This is an original proceeding in certiorari to review a judgment of the Second Judicial District Court.

Charles Reel and Alvin Rae, who will be hereinafter referred to as respondents, were complained against in the municipal court of the City of Reno, for a violation of its Ordinance No. 480. The complaint alleged that on the 29th day of June, 1937, at Reno, in the County of Washoe, State of Nevada, they "did watch, beset, and picket the premises of Berg & Hansen, Inc., a Nevada Corporation, said premises being situated at 315 East Street in said city, county and state, and the approaches thereto, for the purpose of inducing others to refrain from entering such premises, and from patronizing, transacting business with and negotiating with the said owner, Berg & Hansen, Inc., and Lindley & Co., occupant of such premises."

In a second count it was alleged: "That at said time and place the said defendants, in association and agreement with Charles Rowan, H. A. Anderson, and John Ferrari, did assemble, congregate and meet together in the vicinity of the premises being situated at 315 East Street in said city,

county and state, and upon the streets, approaches, and places adjacent thereto, for the purpose of inducing others to refrain from entering such premises and from patronizing, transacting business with and negotiating with the said owner thereof, Berg & Hansen, Inc., and Lindley & Co., occupant of such premises."

Ordinance 480, omitting title reads:

"Section 1. Whoever shall watch, beset or picket the premises of another, where any person is employed, or any approach thereto, or any place or approach thereto, where such employee lodges or resides, for the purpose of inducing any such employee, by compulsion, threats, coercion, intimidation, or by any act of violence, or by putting such employee in fear, to quit his or her employment or to refrain from seeking or freely entering into employment, shall, upon conviction thereof, be fined in any sum not less than Ten Dollars, ($10.00), nor more than Three Hundred ($300.00) Dollars to which may be added imprisonment not exceeding sixty (60) days in the City Jail.

Section 2. Whoever shall watch, beset or picket the premises of another, or any approach thereto for the purpose of inducing others to refrain from entering such premises, or from patronizing, transacting business with or negotiating with the owner or occupant of such premises, shall, upon conviction thereof, be fined in any sum not less than Ten ($10.00) Dollars, nor more than Three Hundred ($300.00) Dollars, to which may be added imprisonment not exceeding sixty (60) days in the City Jail.

Section 3. Whoever, in association or agreement with one or more persons, shall assemble, congregate or meet together in the vicinity of any premises where other persons are employed, or upon the streets, approaches or places adjacent thereto, for the purpose of inducing any such employee, by compulsion, threats, coercion, intimidation or by any act of violence, or by putting such employee in fear, to quit his or her employment therein or to refrain from seeing (seeking) or freely entering

into employment therein, shall, upon conviction thereof, be fined in any sum not less than Ten ($10.00) Dollars, nor more than Three Hundred ($300.00) Dollars, to which may be added imprisonment not exceeding sixty (60) days in the City Jail.

Section 4. Whoever, in association or agreement with one or more persons, shall assemble, congregate, or meet together in the vicinity of the premises of another, or upon the streets, approaches, or places adjacent thereto, for the purpose of inducing others to refrain from entering such premises or from patronizing, transacting business with or negotiating with the owner thereof, of such premises, shall, upon conviction thereof, be fined in any sum not less than Ten ($10.00) Dollars, nor more than Three Hundred ($300.00) Dollars to which may be added imprisonment not exceeding sixty (60) days, in the City Jail.

Section 5. Whoever, for the purpose of compelling, coercing or inducing any persons to quit his or her employment, or to refrain from seeking or freely entering into employment, shall utter to or within the hearing of such person or persons, any derogatory or opprobrious or indecent epithets or language or gestures or threats of violence, shall, upon conviction thereof, be fined in any sum not less than Ten ($10.00) Dollars, nor more than Three Hundred ($300.00) Dollars, to which may be added imprisonment not exceeding sixty (60) days in the City Jail. * * *"

The remaining part of the Ordinance is not involved.

The respondents were tried and found guilty in the municipal court and a fine of $10.00 was assessed to each. They appealed to said district court and the case was submitted upon an agreed statement of facts. The district court held the ordinance unconstitutional and set aside the judgment of the municipal court. The facts stipulated upon which the case was submitted in the district court are as follows:

"IT IS HEREBY STIPULATED by and between the respective parties hereto, acting by and through

their attorneys, that the facts upon which the above-entitled criminal action is hereby submitted to the Court for its decisions, are as follows:

That Berg & Hansen, Inc., is a Nevada Corporation and is the owner of the premises situated at 315 East Street, in Reno, Washoe County, Nevada. That Lindley & Co. is the occupant of said premises. That a large warehouse is situated on the premises and Lindley & Co., conducts a wholesale grocery business at said warehouse; that at least 90% of the merchandise handled by the said Lindley & Co. is purchased outside of the State of Nevada and thereafter brought into Nevada for resale, and that a portion of the merchandise sold by the said Lindley & Co. is sold outside of the State of Nevada. That said warehouse has four large doors in its front on East Street which doors constitute the business entrance to the warehouse and the principal approaches to the warehouse from East Street run to these doors. That groceries and supplies in truck loads are unloaded and loaded at these doors and the trucks engaged in such unloading and loading use the aforesaid approaches to said doors from East Street. That many trucks load and unload at said doors and use said approaches every day and the drivers of many of said trucks are the agents of persons, and persons patronizing, transacting business with and negotiating with Lindley & Co.

That on the 29th day of June, 1937, at about the hour of 9 o'clock A. M. of said day, and for a considerable period of time thereafter, Charles Reel and Alvin Rae walked back and forth along the sidewalk and street and in front of the aforementioned approaches to the side doors, carrying banners upon each of which was written the words 'Lindley & Co., Unfair to Organized Labor.' That their purpose in doing as aforesaid was to induce any and all truck drivers and teamsters carrying groceries and supplies for Lindley & Co., to refrain from entering said premises and from patronizing, transacting and negotiating business with Lindley & Co. That at said time a large number of people gathered

and congregated about said premises. That Charles Rowan, Alvin Rae, Charles Rell, H. A. Anderson and John Ferrari were present in the vicinity of said premises at said time and met together upon East Street and upon said approaches to said premises. That their purpose in doing as aforesaid was to induce any and all truck drivers and teamsters carrying groceries or supplies for Lindley & Co., to refrain entering said premises and from patronizing, transacting business with and negotiating with Lindley & Co. That said Alvin Rae and Charles Reel did so meet and assemble at said time and said place with Charles Rowan, H. A. Anderson and John Ferrari by agreement. That at a meeting of the teamsters union shortly prior to said June 29th, 1937, said teamsters union by a unanimous vote, instructed defendants, Charles Reel and Alvin Rae, to picket said premises and approaches, at which meeting H. A. Anderson, John Ferrari and Charles Rowan were present and at which meeting said Charles Reel and Alvin Rae agreed with H. A. Anderson, John Ferrari and Charles Rowan to assemble and meet together in the vicinity of said premises for said purpose aforesaid.

That said Alvin Rae and Charles Reel at said time and place did not make any overt or actual threats and committed no acts constituting overt or actual intimidation, coercion or violence.

That during all of the time herein mentioned and at said time and place, the employees of Lindley & Co. were not members of any labor unions and were not members of the Teamsters Union. That Charles Reel, Alvin Rae, Charles Rowan, H. A. Anderson and John Ferrari were not, at any time herein mentioned, and at said time and place aforesaid, employees of Lindley & Co.

That said acts aforesaid resulted from the refusal of Lindley & Co. to sign an agreement that Lindley & Co. would employ as teamsters only members of said union, or retain as teamsters only those of its employees willing to become members of said union. That the aforesaid agreement contained a schedule of union hours and wages. • • •"

It was also stipulated that said ordinance of the City of Reno, was adopted from an ordinance of the City of Indianapolis, Indiana.

Petitioner contends that the ordinance is in all respects constitutional and valid and that the district court, in declaring it unconstitutional, acted in excess of jurisdiction.

A preliminary question was raised as to whether the judgment of the district court is reviewable by certiorari. I am of the opinion that it is. Chapman v. District Court, 29 Nev. 154.

It is alleged in the petition that the district court made no ruling, judgment or decision based upon the merits of, or facts involved in said matter, but that said decision rested and was based solely upon the finding of the court that said ordinance was unconstitutional and void. As the record before us discloses this to be true the agreed statement of facts will be laid out of consideration, the question before us being whether the ordinance, as a matter of law, is constitutional. Section 2 and 4 of said ordinance which respondents were charged with violating prohibit picketing in any form. Respondents contend that the ordinance which forbids such picketing is unconstitutional and void because:

1. It infringes upon the right of personal liberty as guaranteed by our state and federal constitutions.

2. It is an unreasonable and oppressive restriction of freedom of speech.

3. It restricts the right freely to assemble.

I am of the opinion that peaceful picketing is a lawful means of labor union activity. This conclusion is induced from the fact, as I understand it, that in peaceful picketing there is an entire absence of fraud, violence, or anything of an intimidating nature. It is characterized by peaceful persuasion for the promotion of a lawful purpose.

The conviction that peaceful picketing for such a purpose is lawful, is strengthened in my mind by the further fact that its lawfulness is sustained by the great weight of modern authority. People v. Harris, 91 Pac. (2nd) 989 (Colo.), and cases cited in that opinion. In addition many

other cases might be cited to that effect. Among these are: Empire Theatre Co. v. Coke, et al., 53 Mont. 183; The Citizens Co. v. Ashville Typo Union, 187 N. C. 42; Goldfield Cons. Mines Co. v. Goldfield Miners Union, 159 Fed. 500 (C. C. A.); Lisse v. Local Union No. 31, 2 Cal. (2nd) 312; Ex Parte Lyons, 81 Pac. (2nd) 190.

Following the case of Exchange Bakery & Restaurant v. Rifkin, 245 N. Y. 260, cited in People v. Harris, supra, the Court of Appeals in Busch Jewelry Co. Inc. et al., v. United Retail Employees Union, Local 830, et al., 22 N. E. (2nd) 320, (N. Y.) said:

> "Organized labor has the right of free speech, peaceful picketing and collective bargaining."

The judicial notion, sometimes expressed, that there can be no such thing as peaceful picketing, is subscribed to by few courts, and repudiated by many. "The doctrine," said the court in George B. Wallace Co. v. International Ass'n., 115 Ore. 652, "that picketing is necessarily a species of coercion and intimidation, is dogma long since discarded." Goldfinger v. Feintuch, 288 N. Y. S. 855.

The proposed final draft No. 6, Restatement of Torts, Group No. 3, American Law Institute, p. 99, Section 24, contains the following concerning picketing:

> "(1) As used in this Chapter, 'fair persuasion' means argument, exhortation or entreaty addressed to a person without, (a) threat of physical harm or economic loss, or (b) persistent molestation or harassment; or (c) material and fraudulent misrepresentations."
>
> (2) Picketing at or near another's place of business for the purpose of persuading third persons, in accordance with the standards stated in subsection (1), to adopt a course of conduct towards his business is a form of fair persuasion of the third persons if access to the place of business is not materially obstructed thereby."

The foregoing paragraphs were finally adopted without change at the 1939 annual meeting of the Institute, and will appear as above quoted in the forthcoming bound volume.

In the explanatory notes to said Section 24, appearing at pp. 203-204 of said proposed Final Draft, it is said:

"The case, (peaceful picketing as a legitimate form of fair persuasion) has been strongly put in Schuster v. International Association of Machinists, 293 Ill. App. 177, 13 N. E. (2nd) 57: 'It has been repeatedly held that where an employer refuses to employ union labor, labor organizations may freely publish in their own official organs and other newspapers, in pamphlets and circulars, or by means of radio, the fact that such employer is unfair to organized labor. Then, why is it not just as lawful for a labor union to make publication of the employers' unfairness by signs carried peaceably by a member or members of the interested union in the vicinity of the place of business of the employers?

It is a matter of common knowledge that many of our well known industrialists and large employers of labor almost daily condemn in the public press the alleged iniquities of organized labor. • • • There is no legal means available to restrain such publicity. Yet when a labor union in a modest way, and utilizing perhaps the only means available which it can afford, seeks to present by signs carried on the person of one or more of its members the truth concerning an employer who refuses to recognize or deal with the union, it is strenuously urged that the employer is entitled to relief from a court of equity to prohibit the display of such signs in front of his place of business.' "

In Senn v. Tile Layers Protective Union, 222 Wis. 383, the court in holding the picketing lawful under the state statute, had this to say of the lawfulness of picketing in general:

"Courts, though differing as to the allowable scope, pretty generally agree that picketing is a legitimate means of economic coercion, if it is confined to persuasion and is free of molestation or threat of physical injury or annoyance."

It was declared in Bayonne Textile Corp. v. American Fed. of Workers, 172 Atl. 551 (N. J.):

"'Picketing is lawful if it does not have an immediate tendency to intimidation of the other party to

the controversy, or to obstruct free passage such as the streets afford, consistent with the right of others to enjoy the same privilege. * * *" Citing Keuffel & Esser v. International Ass'n. of Machinists, 93 N. J. Eq. 429; American Steel Foundaries v. Tri-City C. T. Council, 257 U. S. 184; Nann v. Raimist, 255 N. Y. 307, 75 A. L. R. 669. "The modern view," continued the court, "is that picketing is not per se unlawful, and should not be enjoined, if peaceably carried on for a lawful purpose."

In Scofes v. Helmar, 205 Ind. 596, the court said:

"It is now generally recognized that employees have a legitimate de facto interest in collective action for the purpose of improving their economic situation; and it cannot be questioned seriously that beneficial results to society, as well as to employees individually and as a class have come from an assertion of the collective economic force of employees. The law recognizes this de facto interest to the extent of an immunity from legal responsibility for financial loss to employers which results from strikes and picketing, when such strikes and picketing are conducted in a lawful manner. We may evolve eventually agencies that will adequately protect the interests which employees are now required to protect through the collective economic force but 'so long as the economic order is grounded upon a premise of strife between producer and consumer, between labor and capital, the battle should not be rendered one-sided by perpetuating the advantage which society, combined in the guise of capital, enjoys as a result of an accidental oversupply of labor when the power to influence public opinion is denied workmen.'"

In George B. Wallace Co. v. International Ass'n. of Machanics, 155 Ore. 652, the court said:

"The great majority of courts, including the United States Supreme Court (American Steel Foundries v. Tri-Cities Central Trades Council, 257 U. S. 184, 66 L. Ed. 189, 42 S. Ct. 72, 27 A. L. R. 360), however,

sustain the right of peaceful picketing. * * * This court has long recognized the right of peaceful picketing when done for a lawful purpose. * * * The mere fact that an employer may sustain loss of business as a result of such picketing does not warrant intervention. It is damnum absque injuria."

The lawfulness of peaceful picketing was declared in Clark Lunch Co. v. Cleveland Waiters & Beverage Dispensers Local 106, et al., 154 N. E. 362 (Oh.). In the course of its opinion the court said:

"The plaintiff having determined to operate its business as a nonunion concern, and having refused to employ union labor, may not reasonably expect, nor has it the right to expect the latter's business and support; and, furthermore it has no legal right to prevent a lawful publicity of its actions in this behalf by union labor. It necessarily follows that if plaintiff has a legal grievance in this case, it rests only in the method and manner of distribution of the cards aforesaid. The La France case, supra, and the McCormick case, supra, clearly define the line of demarcation between what is lawful and what is not lawful in this respect. If the methods adopted do not intimidate or coerce, and are without violence, they are lawful. When they involve abuse, violence, intimidation, or coercion, they are unlawful. * * * It is shown that the acts complained of are causing the plaintiff a substantial loss in its business and profits. This fact furnishes no basis for judicial interference, for the plaintiff had no vested property right in the business so lost to it. This is so for the reason that, while it had a legal right to determine its course of action, it must be held to have considered in that connection the influence of union labor on the public, and the benefit of its support and patronage. These are factors in the situation it was bound to consider. It chose to reject union labor and to employ non union labor at lower wages and longer hours of service. It was bound to know that it could not legally prevent publicity in respect to its action.

> Whatever financial loss it now suffers is therefore due to causes of its own making, and within its control, which it must be held to have anticipated."

The foregoing expressions are fairly typical of the great weight of judicial opinion that peaceful picketing is lawful.

While the net result of better reasoned judicial opinion is to that effect, it is universally held that if picketing goes beyond the allowable area of peaceful persuasion and assumes the form of intimidation, threats of violence, or impedes traffic, or interferes with the free use of property, or involves trespass or fraud, it is unlawful.

Petitioner contends that as the ordinance before us, as adopted, is the ordinance of the City of Indianapolis, the decision in Thomas v. Indianapolis, 145 N. E. 550, prior to its adoption here, that it is constitutional, must be the construction given it by this court.

We are referred to several decisions of this court in support of the position. These decisions adhere to the rule that where a statute has received a judicial construction and is afterwards adopted by another state it will be presumed to have been enacted with that construction placed upon it. The presumption is not conclusive; it is however, very persuasive. Menteberry v. Giacometto, 51 Nev. 7. But the rule has no application here. The argument in support of it presumes a doctrine which, if allowed, would substitute the Supreme Court of Indiana as a tribunal to determine the grave question of whether the ordinance before us transgresses the Constitution of Nevada, in the place of the Supreme Court of this state.

Counsel confuses construction, that is, the function of a court to ascertain the scope and meaning of a statute with the duty of determining its validity when laid along side of constitutional guaranties. The rule contended for is applicable only in a case of construction. 14 Am. Juris. 300; Williams v. State, 81 N. H. 341, 125 A. 661, 38 A. L. R. 490; Boyd v. C. L. Ritter Lumber Co., 89 S. E. 273.

The contention made by petitioner's counsel was disposed of in Boyd v. C. L. Ritter Lumber Co., supra, in the following explicit language:

"The statute under which this proceeding is had was taken, it seems, from a statute of the State of Kentucky, which was held constitutional and valid by the Court of Appeals of that state prior to the passage of the act under consideration, namely, Chesapeake Stone Co. v. Moreland, (Ky.) 104 S. W. 762, 16 L. R. A. (N.S.) 479; and it is insisted here for the defendant in error that when a constitutional provision is ordained, or a statute enacted by another state, and it is ingrafted into the Constitution or statutes of this state, and prior thereto such constitutional provision or statute had received judicial construction by the courts of such other state, then it is to be presumed that the lawmaking power of this state intended that the constitutional provision or statute should be given the same construction in this state that it was given in the state from which it was taken. This principle of construction, however, applies only to the construction of constitutional provisions and statutes, and has no relation, as the authorities hold, to the question of whether or not a statute is constitutional and valid. In other words, the Legislature, by enacting a statute which has been held constitutional and valid by the courts of another state, cannot deprive the courts of this state of the right to determine for themselves the question of the constitutionality of such statute."

It may be conceded in conformity with counsel's contention that the City Council of Reno in adopting the Indianapolis ordinance as its own intended to adopt it with the stamp of approval by the Indiana Supreme Court and intended it to be constitutional. But whether it is so in fact is properly the subject of determination by the courts of this state.

Sections 2 and 4 of the ordinance do not seek to merely regulate picketing, as by limiting the number of pickets, specifying the number of paces they must be separated from each other, requiring them to remain on the outer half or other fractional part of the sidewalk, limiting the size of the banner which may be carried, forbidding picketing under circumstances claimed to be unlawful, tortious, or

inequitable, or containing other regulations designed to reasonably control picketing. They go beyond regulation. They are a sweeping prohibition of any form of picketing, irrespective of its nature, purpose or number of pickets, and constitute an interdiction of all activities and free speech sought to be exercised in the form of peaceful picketing. The federal constitution guarantees freedom of speech. In the Fourteenth Amendment it is declared: "nor shall any state deprive any person of life, liberty or property without due process of law." The due process clause in the Fourteenth Amendment is a prototype of the due process clause in our Constitution. Art. 1, Section 8. In Art. 1, Section 9, it provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." Notwithstanding these guaranties, the exercise of these rights is not absolute. They may be regulated under the police power of the state. Liberty regulated by law is a fundamental of our democratic government. However, neither freedom of speech nor liberty of action may be suppressed under the guise of regulation. They are not subject to the exercise of arbitrary power. Any annoyance or loss of business caused to an employer by lawful picketing does not warrant the exercise of the police power of the state. By the weight of authority loss of business to an employer in such an economic contest is damnum absque injuria. George B. Wallace Co. v. International Ass'n. supra; People v. Harris, supra; Exchange Bakery & Restaurant v. Rifkin, supra; Senn v. Tile Layers Union, 301 U. S. 468.

In the New York case it was held: "Resulting injury is incidental and must be endured."

In Senn v. Tile Layers Union, it was said:

> "It is true that disclosure of the facts of the labor dispute may be annoying to Senn (employer), even if the method and means employed in giving publicity (picketing) are inherently unobjectionable. But such annoyance, like that often suffered from publicity in other connections, if not an invasion of the liberty

guaranteed by the Constitution. (Citation). It is true, also that disclosures of the facts may prevent Senn from securing jobs which he hoped to get. But a hoped-for job is not property guaranteed by the Constitution. And the diversion of it to a competitor is not an invasion of a constitutional right."

While such annoyance or such loss does not warrant the exercise of the police power of the state, it is well settled that such inherent power is not available for the protection of an individual or class of individuals, but for the protection of the community. It may not be exercised for private purposes.

As stated by Judge Farrington, speaking for the Court in Goldfield Cons. Mines Co. v. Goldfield M. U. No. 220, 159 Fed. 500:

> "It is too clear to require a citation of authorities that the Legislature has no power to restrict the exercise of a constitutional right, unless the interests of the public, as distinguished from the interests of the individual, or of a class of individuals, demand such restraint. The act so forbidden by the Legislature must be detrimental to the public welfare, and the health, safety, or morals of the community to justify such interference."

That the city may, in the exercise of its police power, regulate the methods of publicity as well as the use of the streets, is conceded. Senn v. Tile Layers Union, 301 U. S. 468. But it cannot, under the cloak of regulation, prohibit such means or such use. It cannot make criminal an innocent act when no interference is had with public health, safety, comfort or welfare. 16 C. J. S. 564.

The theory on which it is sometimes said that the government, either by the legislature or a municipality, may enact valid legislation against all picketing, is that this means of publicity, however it may be confined to peaceful persuasion, tends to provoke disorder and impedes traffic. On this account it is declared the exercise of the police power is justified to suppress it. I cannot agree with the idea

that peaceful persuasion in the form of picketing has any such tendency. As said in Exchange Bakery & Restaurant v. Rifkin, supra: such "picketing connotes no evil." The doctrine that it does connote such evil consequences as disorder or street obstruction, as previously pointed out, has long since been discarded.

"In practice," says the writer on the Constitutionality of anti-picketing ordinances in the Yale Law Journal, Volume 48, page 314, "dangers to the public peace arising from picketing activities can be adequately controlled by an effective police administration."

In Hague v. Committee for Industrial Organization, 83 L. Ed. 928, Mr. Justice Roberts wrote:

> "It (the ordinance involved) does not make comfort or convenience in the use of the streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly 'prevent' such eventualities. *But uncontrolled* official suppression of the privilege *cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.*" (The italic is mine.)

I may also add that the prohibition of personal liberty cannot be made a substitute for the duty to maintain order in connection with the exercise of the right. Moreover, the contention that the suppression of peaceful picketing is necessary because its tendency is to incite disturbances and obstruct the free use of the streets, and is therefore inimical to the public welfare, is not a very flattering commentary on the efficiency of the police system of a city; for picketing assignments are ordinarily carried out in quarters under police supervision, and not in isolated places.

It is largely upon the false premise, as I see it, that peaceful picketing had a tendency "to give rise to contentions and

argument that often result in bloodshed and riot," that the court in Thomas v. Indianapolis, supra, held that the ordinance in question here was a reasonable exertion of the police power and therefore free from the objection that it violated constitutional guaranties of personal liberty. For this reason it lends no strength to the presumption in favor of the constitutionality of the ordinance.

The case of Hardie-Tynes Mfg. Co. v. Cruise, et al., 189 Ala. 66, also relied on by petitioner, inclines to the same doctrine. Besides the constitutional feature was not much urged upon the court, as appears from the following statement:

> "It is suggested by counsel for respondents that our construction of section 6395, as being an inhibition of picketing even where threats or violence are not used, renders it unconstitutional. No intimation is offered as to what provision of the Constitution is thereby offended, and we can think of none."

Pierce v. Stablemen's Union, Local No. 8760, 103 Pac. 324; (Cal.); Moore, et al., v. Cook's and Waiter's Union, 179 Pac. 417 (Cal.); Barnes v. Chicago Typographical Union, 83 N. E. 940 (Ill.); Ex Parte Stout, 82 Tex. Crim. Rep. 183, L. R. A. 1918C, 198 S. W. 967; St. Germain v. Bakery & Confectionery W. Union, 166 Pac. 667 (Wash.), are also cited by petitioner. It is to be observed, that since the decisions above noted were rendered there has been considerable change in the legislative and judicial viewpoint as to labor controversies. As stated in Local Union No. 26, N. S. O. P. v. Kokomo (Ind.), 5 N. E. (2nd) 624:

> "Formerly the courts were inclined to disapprove collective bargaining, striking, and picketing. However, the past few years have witnessed a decided change in public opinion, legislative enactments and judicial construction."

This lately prevalent trend of legislative and judicial treatment in labor disputes is noted in Columbia Law Review, Vol. 48, and in the same article, at pages 1527 and 1528,

the case of labor's right to picket, free from governmental restraint is strongly stated as follows:

> "Although it is exceedingly difficult to extract from the cases a standard for predicting the fate of regulations yet to be tested, it is most desirable that the nature of the right to picket be clearly defined. Fortunately, such a crystallization has begun. In Senn v. Tile Layers' Union, the United States Supreme Court for the first time identified the right to picket with the right of free speech. Mr. Justice Brandies wrote for the majority in that case: 'Clearly the means which the statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution. * * * In declaring such picketing permissible Wisconsin has put this means of publicity on a par with advertisements in the press.' Early this year (1938) the Supreme Court also emphatically denied the authority of a municipality to limit freedom of speech by restricting the right to distribute leaflets. (Lovell v. City of Griffin, 303 U. S. 444.) It is plain that picketing and leaflet distribution raise highly similar municipal problems. Both involve the possibility of impeding traffic and both involve considerations as to the propriety of using the streets for the purpose of presenting to the public one's point of view. These recent cases lend substance to the hope that picketing is to be afforded the protection of the Fourteenth Amendment in a manner paralleling the guarantee of the right to distribute leaflets."

Freedom of the press and freedom of speech are the same, being distinguished only in the form of utterance, 16 C. J. 628.

Long since the rendition of any of the decisions heretofore mentioned on which petitioner relies, including Thomas v. Indianapolis, supra, the Supreme Court of the United States, in May, 1937 identified the right to picket with the

right of free speech. Two years after the United States Court announced that doctrine, the Supreme Court of Colorado, in the case of People v. Harris, 91 Pac. (2nd) 989, declared unconstitutional and void a statute of that state forbidding peaceful picketing. The attorney general of that state joined with counsel for the defendant in urging the invalidity of the statute. It is to be noted also that the court pointed out that Alabama was the only other state out of the forty-eight states in the Union that had a similiar statute.

In the Colorado case the defendant, Harris, was charged in the lower court with violating the anti-picketing statute. He pleaded not guilty, waived a jury trial and the case was submitted on a stipulation of facts. He was adjudged not guilty and discharged. The case came before the supreme court on a writ of error sued out by the people. There, as here, the court was confronted with a provision of criminal law which did not regulate, but prohibited peaceful picketing. The facts stipulated revealed that such was the nature of the picketing. The court cited many authorities to show that the lawfulness of such picketing was sustained by the great weight thereof. In this connection the Court said:

> "No legal injury of any kind resulted to any person because of his picketing activities. That the employer has the right to refuse to pay union wages and maintain union standards is conceded. Correspondingly, labor has the right to decline to carry on any business relation with such an employer. Any loss which occurs in such economic controversies is damnum absque injuria."

It also said:

> "It is contended that section 90, supra, (the statute outlawed) is valid as a reasonable exercise of the police power. If this section, instead of prohibiting peaceful picketing, could be so construed as to be only a reasonable regulation thereof, the contention would be sound; but it prohibits all peaceful picketing. Any legislative exercise under the police power which violates any right guaranteed by the national or state Constitutions

is invalid. In re Morgan, 20 Colo. 415; 58 P. 1071, 47 L. R. A. 52, 77 Am. St. Rep. 269; Lovell v. City of Griffin, supra, 12 C. J. 938, 939. 'Freedom is the general rule, and restraint the exception.' Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 534, 43 S. Ct. 630, 632, 67 L. Ed. 1103, 27 A. L. R. 1280. It cannot be successfully maintained that guaranties of freedom of speech are less important than guaranties relating to property."

The court finally concluded:

"Whatever our individual views may be on economic controversies, such as are involved here, we cannot consent to legislative invasion of constitutional guaranties to the extent for which contention is made in this case. The line of demarkation between police power and constitutional guaranties is not always well defined. Where a law, such as section 90, here under consideration, impairs freedom of speech, as it does, in view of the stipulated facts before us, we have no doubt that it constitutes an invasion of constitutional guaranties, both under the state and federal due-process-of-law clauses and the mandatory provision prohibiting the enactment of laws impairing the freedom of speech.

The judgment is affirmed."

The Colorado case is squarely in point with the instant case and is buttressed with ample authority. It reflects the modern view that peaceful picketing is lawful and is immune from legislative interdiction by reason of constitutional guaranties.

In an earlier opinion, the Supreme Court of Missouri in City of St. Louis v. Gloner, 210 Mo. 502, declared void an ordinance of St. Louis which, in effect prohibited peaceful picketing. The ordinance provided in part that any person or persons "who shall lounge, stand or loaf around or about or at any street corners or other public places, in the day time or night time * * * shall be deemed guilty of a misdemeanor." The testimony disclosed that defendant was engaged in peaceful picketing. The court said:

"While the city has the undoubted right, under its charter, to regulate the use of its streets, it has no right to do so in a way that interferes with the personal liberty of the citizen as guaranteed to him by our Constitution and laws."

The court quoted approvingly the following from one of its former decisions:

"They (pickets) are free men, and have a right to quit the employ of plaintiffs whenever they see fit to do so, and no one can prevent them; and whether their act of quitting is wise or unwise, just or unjust, it is nobody's business but their own, and they have a right to use fair persuasion to induce others to join them in their quitting."

It was finally declared:

"Our conclusion is that the ordinance is unconstitutional and invalid because it infringes upon the right of personal liberty, and is unreasonable and oppressive."

Counsel for petitioners, as well as the court, in Ex Parte Stout, supra, seeks to discount the effect of the foregoing decision because the ordinance did not in terms prohibit picketing. The distinction sought to be made is not apparent. *The court outlawed the ordinance because when applied to the facts of the case, it prohibited peaceful picketing.* Its terms embraced a prohibition of such picketing.

Counsel for petitioner also seeks to discount the case of Senn v. Tile Layers Protective Union, supra, as an authority favorable to the view that the ordinance is unconstitutional. He says: "It clearly appears from that case that the state may regulate picketing in the exercise of police power."

This may be conceded, but we have an ordinance before us which, in sections 2 and 4 thereof, does not regulate, but prohibits peaceful picketing.

In Senn v. Tile Layers Protective Union, supra, the constitutionality of state anti-injunction legislation designed to prohibit judicial interference with peaceful picketing, was declared, and the intimation that such picketing is protected

by the constitutional guaranty of free speech, is too plain to be misunderstood.

In Ex Parte Lyons, 81 Pac. (2nd) 190 (Cal), it was declared: "In this state the right to peacefully picket rests upon the constitutional guaranty of the right of free speech."

The ordinance on its fact, in sections 2 and 4 is obviously adapted to protect the employer from annoyance and incidental loss of business rather than to protect the public in maintaining its peace and the unobstructed use of the streets. But such annoyance and loss in a labor dispute are not tortious nor do they constitute an invasion of any constitutional rights. Senn v. Tile Layers Union, supra. These sections bear no reasonable and substantial relation to the promotion of the public safety, health, morals, general welfare, for which the exercise of the police power may be invoked.

I am of the opinion that sections 2 and 4 of the Reno City Ordinance No. 480 are unconstitutional and void, in that they invade the constitutional guaranties of the due process of law clauses of the federal and state constitution, and of section 9 of Article 1 of the state constitution guaranteeing free speech and forbidding the state to pass any law to restrain or abridge the liberty of speech. The other sections of the ordinance being separable are not affected by the invalidity of sections 2 and 4.

I deem it unnecessary to pass on the other objections of respondents to the ordinance.

As Chief Justice Taber concurs in these views:

It is therefore ordered that the judgment of the lower court, in so far as it adjudges said sections 2 and 4 of said ordinance unconstitutional and void, be, and the same is hereby affirmed.

It is further ordered that said judgment, in so far as it adjudges other parts of the ordinance unconstitutional and void, be, and the same is hereby annulled.

DUCKER, *J.*

I concur:

TABER, *C. J.*